

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANILECH SHARMA and PARMA SHARMA, No C 09-5968 VRW
Plaintiffs, ORDER
v

PROVIDENT FUNDING ASSOCIATES, LP,
a California limited partnership;
PREFERRED MORTGAGE, a California
business entity, form unknown;
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC, a California
corporation; MAX DEFAULT SERVICES
CORPORATION, a California
corporation; and DOES 1 through
100, inclusive,
Defendants.

On October 8, 2010, defendants Provident Funding Associates, LP, Mortgage Electronic Registration Services, Inc and Max Default Services Corporation moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Doc #28. On December 15, 2010, plaintiffs partially opposed defendants' motion. Doc #30. For the reasons set forth below, the court GRANTS defendants' motion to dismiss the second, third, fourth, fifth, sixth, seventh, eighth, tenth and eleventh causes of action and DENIES defendants' motion to dismiss the first and ninth causes of action.

I

Plaintiffs are owners of a single family residence located at 22169 Betlen Way, Castro Valley, California 94546 ("the Property"). Doc #1 at 2. The complaint alleges that defendant Preferred Mortgage ("Preferred") was a loan broker doing business in San Ramon, California and defendant Provident Funding Associates, LP ("Provident") was a residential mortgage lender doing business in Alameda County. Id at 2-3. Plaintiffs allege that they were solicited by Marquis Buck, an authorized agent of Preferred, to purchase their home using Provident as the lender. Id at 4. Buck allegedly told them that they qualified for a "special" loan program offered by Provident that would allow them to purchase their home at a reduced rate of 6%. Id. Plaintiffs allege that they believed the loan was a fixed-rate loan and that they would be able to refinance the loan at a lower rate in one year. Id. Based on these representations, plaintiffs agreed to the loan transaction.

Plaintiffs allege that they later learned that the "special" loan program was really "a sub-prime, adjustable-rate, interest-only, negative amortizing loan, and that the 6% interest rate would rise dramatically, along with their payment and principal balance on the loan." Id at 5. In 2009, plaintiffs began to experience financial problems and submitted loan modification paperwork to Provident. Id at 7. Provident offered a trial modification. Id. On August 31, 2009, Provident recorded a Notice of Default and Election to Sell Under Deed of Trust ("NOD"). Id. Defendant Max Default Services Corporation is the foreclosing trustee on the promissory note and deed of trust. Id at 3.

1 under a cognizable legal theory. Balistreri v Pacifica Police
2 Dep't, 901 F2d 696, 699 (9th Cir 1990). Allegations of material
3 fact are taken as true and construed in the light most favorable to
4 the nonmoving party. Cahill v Liberty Mutual Ins Co, 80 F3d 336,
5 337-38 (9th Cir 1996). But "the court [is not] required to accept
6 as true allegations that are merely conclusory, unwarranted
7 deductions of fact, or unreasonable inferences." Spewell v Golden
8 State Warriors, 266 F3d 979, 988 (9th Cir 2001), citing Clegg v
9 Cult Awareness Network, 18 F3d 752, 754-55 (9th Cir 1994).

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11 III

12 Plaintiffs do not oppose defendants' motion to dismiss
13 the second cause of action for rescission and restitution, fourth
14 cause of action for breach of the implied covenant of good faith
15 and fair dealing, tenth cause of action for quiet title and
16 eleventh cause of action for declaratory and injunctive relief.
17 Doc #30 at 2. Plaintiffs also do not oppose defendants' motion to
18 dismiss their fifth cause of action for breach of fiduciary duty,
19 sixth cause of action for fraudulent misrepresentation, seventh
20 cause of action for fraudulent concealment and eighth cause of
21 action for civil conspiracy to defraud, although plaintiffs intend
22 to re-plead these four causes of action as a single cause of action
23 for fraud. *Id.* Accordingly, the court GRANTS defendants' motion
24 to dismiss the second, fourth, fifth, sixth, seventh, eighth, tenth
25 and eleventh causes of action.

26 Plaintiffs argue that the complaint is sufficient with
27 respect to the first cause of action for wrongful foreclosure,
28 third cause of action for violation of the Real Estate Settlement

1 Procedures Act ("RESPA") and ninth cause of action for unlawful
2 business practices under California Business & Professions Code
3 section 17200 et seq. Doc #30 at 2. The court considers each of
4 these causes of action in turn.

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6 A

7 Plaintiffs' first cause of action for wrongful
8 foreclosure is styled as a "negligence per se" claim. Doc #1 at 8.
9 Plaintiffs allege that defendants violated California Civil Code
10 section 2923.5, which sets forth certain procedures with which a
11 lender must comply prior to filing a notice of default. Doc #1 at
12 8-10. Defendants argue that plaintiffs' claim fails because
13 "[d]efendants performed all duties owing to Plaintiffs under the
14 terms of the Civil Code Section 2923.5, the loan and in Defendants
15 [sic] role as a traditional mere money lender." Doc #28 at 11.
16 Accordingly to defendants, "a lender owes no duty of care to a
17 borrower, unless 'the lender actively participates in the financed
18 enterprise beyond the domain of the usual money lender.'" Id at
19 10, quoting Wagner v Benson, 101 Cal App 3d 25, 35 (1980).

20 In California, negligence per se is an evidentiary
21 doctrine codified at California Evidence Code section 669. Under
22 that statute, "a presumption of negligence arises from the
23 violation of a statute which was enacted to protect a class of
24 persons of which the plaintiff is a member against the type of harm
25 that the plaintiff suffered as a result of the violation." Quiroz
26 v Seventh Ave Center, 140 Cal App 4th 1256, 1285 (2006). The
27 presumption arises if four elements are established: (1) the
28 defendant violated a statute or regulation; (2) the violation

1 caused the plaintiff's injury; (3) the injury resulted from the
2 kind of occurrence the statute or regulation was designed to
3 prevent; and (4) the plaintiff was a member of the class of persons
4 the statute or regulation was intended to protect. Alejo v City of
5 Alhambra, 75 Cal App 4th 1180, 1184-85 (1999). The court will
6 evaluate plaintiffs' allegations with respect to each element.

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9 Plaintiffs allege that defendant violated California
10 Civil Code section 2923.5, which imposes substantive obligations on
11 lenders to "contact the borrower by phone or in person to assess
12 the borrower's financial situation and explore options for the
13 borrower to avoid foreclosure." Mabry v Superior Court, 185 Cal
14 App 4th 208, 209 (2010) (internal quotations omitted). The statute
15 provides:

16 During the initial contact, the mortgagee, beneficiary, or
17 authorized agent shall advise the borrower that he or she has
18 the right to request a subsequent meeting and, if requested,
19 the mortgagee, beneficiary, or authorized agent shall schedule
20 the meeting to occur within 14 days. The assessment of the
21 borrower's financial situation and discussion of options may
22 occur during the first contact, or at the subsequent meeting
scheduled for that purpose. In either case, the borrower
shall be provided the toll-free telephone number made
available by the United States Department of Housing and Urban
Development (HUD) to find a HUD-certified housing counseling
agency.

23 Cal Civ Code § 2923.5(a)(2). The initial contact must occur at
24 least thirty days prior to the filing of a notice of default. Cal
25 Civ Code § 2923.5(a)(1). Plaintiffs allege that "at no time prior
26 to issuing the NOD did [Provident] or anyone acting on its behalf
27 contact Plaintiffs to discuss options to pay the loan or to assess
28 their financial situation to avoid foreclosure as required by

1 California Civil Code section 2923.5." Doc #1 at 7-8. Plaintiffs
2 further allege that each defendant "proceeded to notice the default
3 and pending sale of the Subject Property without * * * (1)
4 evaluat[ing] Plaintiff's financial condition regarding foreclosure
5 avoidance; (2) advis[ing] Plaintiffs of their statutory right to
6 meet with Defendants regarding such foreclosure avoidance; and (3)
7 advis[ing] Plaintiffs of the toll-free [HUD] telephone number
8 regarding counseling opportunities to avoid the subject
9 foreclosure." Id at 9-10. These allegations are sufficient to
10 state a violation of section 2923.5.

11 Defendants argue that they owed no duty of care because
12 they acted as mere "money lenders." Doc #28 at 10. The cases
13 cited by defendants, however, address only the general duties of
14 lenders. In Wagner v Benson, the court affirmed the dismissal of a
15 negligence claim based on a bank's alleged negligence in loaning
16 money to the borrowers for a "risky venture." 101 Cal App 3d 27,
17 35 (1980). Similarly, in Nymark v Heart Federal Savings & Loan
18 Association, the court held that a lender owed no duty of care to a
19 borrower "in appraising the borrower's collateral to determine if
20 it [was] adequate security for a loan." 231 Cal App 3d 1089, 1095-
21 97 (1991). Unlike both of these cases, defendants were the subject
22 of an explicit statutory duty: the substantive obligations imposed
23 by California Civil Code section 2923.5 to communicate with
24 plaintiffs prior to filing a notice of default. Because plaintiffs
25 allege sufficient facts to establish that defendants failed to meet
26 these obligations, the complaint adequately alleges the first
27 element of negligence per se.
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Plaintiffs allege that "[a]s a direct and proximate result of the wrongful conduct described herein, Plaintiffs have suffered compensable damages according to proof." Doc #1 at 10. Plaintiffs also allege that they attempted to engage in the dialogue required by section 2923.5, were unable to obtain a permanent modification of the loan and that defendants proceeded with the trustee sale without contacting plaintiffs to discuss options to avoid foreclosure. Id at 7. Read as a whole, these allegations are sufficient to allege that plaintiffs suffered damage as a result of the alleged statutory violation.

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The third and fourth elements ask whether the injury resulted from the type of occurrence the statute was designed to prevent and whether plaintiffs are members of the class of persons the statute was intended to protect. Alejo, 75 Cal App 4th at 1184-85. "Section 2923.5 was enacted in 2008 as a manifestation of a felt need for urgent action in the midst of a cascading torrent of foreclosures." Mabry, 185 Cal App 4th at 219. The legislature found that the bill was "necessary to avoid unnecessary foreclosures of residential properties and thereby provide stability to California's statewide and regional economies and housing market by requiring early contact and communications between mortgagees, beneficiaries, or authorized agents and specified borrowers to explore options that could avoid foreclosure." Cal Civ Code § 2923.5, 2008 Legislative Findings (SB 1137). There can be little question that the occurrence alleged in

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1 the complaint is of the kind that section 2923.5 was designed to
2 prevent. Similarly, as alleged owners of a residential property
3 subject to foreclosure, plaintiffs are within the class of persons
4 that section 2923.5 was designed to protect. The complaint
5 sufficiently alleges the third and fourth elements of plaintiffs'
6 negligence per se theory of liability.

7 Accordingly, the court DENIES defendants' motion to
8 dismiss the first cause of action.

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10 B

11 Plaintiffs' third cause of action for violations of RESPA
12 is based on two distinct alleged violations: (1) defendants
13 "violated RESPA by receiving money and/or other things of value for
14 referrals of settlement service business related to the subject
15 loan, including secret kickbacks and yield spread premiums to loan
16 brokers such as [Preferred]," and (2) defendants "engaged in a
17 pattern and practice of non-compliance with the requirements of
18 RESPA, including failing and refusing to respond in full to
19 properly submitted [qualified written requests]." Doc #1 at 11-12.
20 The court examines each theory of liability.

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22 1

23 Although plaintiffs do not specify the section of RESPA
24 that supports their claim based on improper kickbacks, 12 USC §
25 2607 sets forth the general prohibition on unearned kickbacks and
26 fees. The court will therefore analyze plaintiffs' claim under
27 that section. Section 2607(a) provides: "No person shall give and
28 no person shall accept any fee, kickback, or thing of value

1 pursuant to any agreement or understanding, oral or otherwise, that
2 business incident to or a part of a real estate settlement service
3 involving a federally related mortgage loan shall be referred to
4 any person." 12 USC § 2607(a). Section 2607(c)(2) provides:
5 "Nothing in this section shall be construed as prohibiting * * *
6 the payment to any person of a bona fide salary or compensation or
7 other payment for goods or facilities actually furnished or for
8 service actually performed." 12 USC § 2607(c)(2). HUD, the
9 administrative agency charged with enforcing RESPA, issued a
10 Statement of Policy on March 1, 1999 setting forth standards for
11 evaluating whether a payment violates section 2607. The Statement
12 of Policy provides a two-pronged test:

13 In determining whether a payment from a lender to a mortgage
14 broker is permissible under Section 8 of RESPA, the first
15 question is whether goods or facilities were actually
16 furnished or services were actually performed for the
17 compensation paid. The fact that goods or facilities have
18 been actually furnished or that services have been actually
performed by the mortgage broker does not by itself make the
payment legal. The second question is whether the payments
are reasonably related to the value of the goods or facilities
that were actually furnished or services that were actually
performed.

19 1999 Statement of Policy, 64 Fed Reg 10080, 10084 (1999). "The HUD
20 test focuses on whether compensable services of the sort identified
21 in the 1999 Statement are provided, and if they are, then on
22 whether the total compensation (without regard to whether it comes
23 from the borrower, the lender, or both) is reasonably related to
24 the services provided." Schuetz v Banc One Mortgage Corp, 292 F3d
25 1004, 1013 (9th Cir 2002). Thus, to establish that a particular
26 payment violated section 2607, a plaintiff must establish either
27 that no goods, facilities or services were provided or, if they
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were, that the payment at issue was not reasonably related to the goods, facilities or services. Id at 1014.

The complaint fails to allege facts regarding whether any goods, facilities or services were provided by the alleged recipient of the payment or whether the payment was reasonably related to any such goods, facilities or services. See Doc #1 at 12. The conclusory allegation that defendants received "money and/or other things of value for referrals of settlement service business" does not address whether such payments were made in connection with the provision of legitimate services. As a result, plaintiffs fail to allege a violation of RESPA based on the alleged receipt or payment of "secret kickbacks."

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Plaintiffs' RESPA claim for an alleged failure to respond to qualified written requests is governed by section 2605(e). That section provides "[i]f any servicer of a federally related mortgage loan receives a qualified written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 20 days * * * unless the action requested is taken within such period." 12 USC § 2605(e)(1)(A). Not later than sixty days after the receipt of a qualified written request, the servicer shall make any appropriate corrections to the borrower's account and provide a written explanation to the borrower that includes the information requested by the borrower or an explanation regarding why the information requested is unavailable. 12 USC § 2605(e)(2).

1 Plaintiffs allege that defendants "fail[ed] and refus[ed]
2 to respond in full to properly submitted [qualified written
3 requests]." Doc #1 at 11. Plaintiffs also allege that they mailed
4 a qualified written request to Provident on December 17, 2009 and –
5 as of December 21, 2009, the date they filed their complaint – had
6 received no response. Id at 8. These allegations are not
7 sufficient to support plaintiffs' claim for violations of RESPA.
8 Critically, only four days had elapsed between plaintiffs' mailing
9 of the request and defendants' alleged failure to respond. The
10 plain language of the statute does not require any action by the
11 servicer until twenty days after receipt of the request. 12 USC §
12 2605(e)(1)(A). These allegations are therefore insufficient to
13 establish a violation of RESPA.

14 In response to defendants' motion to dismiss, plaintiffs
15 argue that – as of December 15, 2010 – they still had not received
16 any response. Doc #30 at 8. Plaintiffs, however, did not provide
17 any evidence to support this claim, let alone evidence that the
18 court may properly consider in the context of a FRCP 12(b)(6)
19 motion. Moreover, "[i]n determining the propriety of a Rule
20 12(b)(6) dismissal, a court may not look beyond the complaint to a
21 plaintiff's moving papers, such as a memorandum in opposition to a
22 defendant's motion to dismiss." Schneider v Cal Dept of
23 Corrections, 151 F3d 1194, 1197 n1 (9th Cir 1998).

24 Accordingly, the court GRANTS defendants' motion to
25 dismiss plaintiffs' third cause of action for violations of RESPA.

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C

Plaintiffs' ninth cause of action for violation of California Business & Professions Code section 17200 alleges that defendants engaged in a variety of unlawful business practices, including "misrepresentations and concealment [of] the inception, terms, ownership and servicing [of] Plaintiffs' loan, foreclosure on the Subject Property without complying with Civil Code §§ 2923.5 and 2924, and the conspiracy to defraud and defrauding of Plaintiffs to induce them to enter into and continue making payments under the subject loan." Doc #1 at 18.

Section 17200 prohibits "any unlawful, unfair or fraudulent business act or practice." Cal Bus & Prof Code § 17200. "The scope of the UCL is quite broad.[] Because the statute is framed in the disjunctive, a business practice need only meet one of the three criteria to be considered unfair competition." McKell v Washington Mutual, Inc, 142 Cal App 4th 1457, 1471 (2006). "By proscribing 'any unlawful' business practice, section 17200 'borrows' violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." Cel-Tech Communications, Inc v Los Angeles Cellular Telephone Co, 20 Cal 4th 163, 180 (1999) (internal quotations omitted). "Virtually any law – federal, state or local – can serve as a predicate for an action under Business and Professions Code section 17200." Durell v Sharp Healthcare, 183 Cal App 4th 1350, 1361 (2010), quoting Ticconi v Blue Shield of Cal Life & Health Ins Co, 160 Cal App 4th 528, 539 (2008).

Plaintiffs incorporate the allegations in their cause of action for unlawful foreclosure and violations of California Civil

1 Code section 2923.5 to support their claim for unlawful business
2 practices. As discussed above in section IIIA1, plaintiffs have
3 alleged sufficient facts to establish a violation of California
4 Civil Code section 2923.5. Therefore, plaintiffs have also stated
5 a claim for unlawful business practices under section 17200.
6 Accordingly, the court DENIES defendants' motion to dismiss the
7 ninth cause of action for unlawful business practices.

IV

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10 For the foregoing reasons, the court GRANTS defendants'
11 motion to dismiss the second, third, fourth, fifth, sixth, seventh,
12 eighth, tenth and eleventh causes of action and DENIES defendants'
13 motion to dismiss the first and ninth causes of action.

14 Plaintiffs are granted leave to amend and shall serve and
15 file an amended complaint on or before February 18, 2011.

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17 IT IS SO ORDERED.



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19 VAUGHN R WALKER

20 United States District Judge
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